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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROWLAND MARCUS ANDRADE,

Defendant.

CASE NO.: 20-cr-00249-RS

**DEFENDANTS' REPLY TO
GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL
DISCOVERY**

Judge: Honorable Richard Seeborg

Trial Date: None Set

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DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO DEFENDANT’S
MOTION TO COMPEL DISCOVERY

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**POINTS AND AUTHORITIES IN FURTHER SUPPORT OF
DEFENDANT’S MOTION TO COMPEL DISCOVERY**

I. INTRODUCTION

On December 24, 2020, the defense filed a motion seeking an order from this Court compelling the Government to produce approximately 25 categories of documents (Dkt No. 33). The vast majority of the documents requested from the Government are generally covered by the Federal Rules of Criminal Procedure 16, 26.2, the Jencks Act, codified in 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

On January 8, 2021, the Government filed an opposition to the Defendant’s Motion to Compel Discovery (Dkt No. 38). The Government’s Opposition does not address the defense’s repeated attempts to resolve discovery issues without judicial intervention. The Government continuously ignored the defense’s repeated request for a status report on the outstanding discovery. Specifically, on October 22, 2020, counsel for Mr. Andrade sent a letter containing a series of discovery requests to the Government. On October 28, 2020, the Government responded, in part, by producing approximately 85,000 pages of documents but failed to provide several categories of documents and information requested by Mr. Andrade. Consequently, counsel for Mr. Andrade sent three emails to the Government requesting an update on the status of the Government’s anticipated document production. The first email was sent on October 30th (Exhibit A at 2). The Government did not respond to that email. The second email was sent to the Government on November 10th (Exhibit A at 1-2). Again, the Government did not respond to that email. The third email was sent on December 7th (Exhibit A at 1). In the third email, the defense advised the Government to “please respond by Thursday, December 10, to let us know a date certain—no later than December 21--by when we will receive the remaining discovery. If we do not get a response or do not receive discovery by those dates, *we will file a motion to compel* to

1 ensure that the Court can address the Government's failure to respond at the January status
2 conference (emphasis added)."¹

3 To be clear, contrary to what the Government stated in their Opposition to the Defense
4 Motion to Compel Discovery that discovery issues could be resolved through a meet-and-confer,
5 the Government did not offer the defense the opportunity to meet-and-confer concerning the
6 outstanding discovery issues in this case until after the Court requested additional briefing. (Dkt.
7 39.) Had they extended that offer in the past, and/or responded to the defense's repeated requests
8 for updates, the defense would not have needed to file a motion to compel discovery.

9
10 On January 20, 2021, the parties held a meet-and-confer conference for the first time. It
11 was a very productive meeting. The parties believe that we can now resolve a substantial portion
12 of the discovery issues without judicial intervention. Based on the parties' discussions during the
13 January 20th meet-and-confer, we believe that discovery in this matter will be substantially
14 completed by March 2021. There do remain some issues that will require judicial intervention,
15 however.

16 Discussed below is the status of the various categories of Mr. Andrade's discovery
17 demands and the identification of outstanding issues.

18 **II. STATUS OF DISCOVERY CATAGORIES**

19 **A. Bill of Particulars**

20 In their opposition, the Government claimed that the indictment in this case complies with
21 Rule 7(c)(1), and there is no need for a bill of particulars. The defense disagrees with the
22 Government's assessment of the clarity of the indictment in this case. Nonetheless, judicial
23

24
25 ¹ The Government finally responded to the defense by email on December 7th. In their December 7th email, the
26 Government stated that they were currently working on the next production and will let the defense know when they
27 have a specific target for production. However, no additional documents were produced to the defense until after
28 the defense filed a motion to compel discovery. Thus, the motion to compel discovery had its intended impact - -
forced the Government to prioritize and focus on its discovery obligations to Mr. Andrade who faces a possible
prison sentence of up to 20 years and significant monetary penalties if convicted of either count in the two-count
Indictment charging violations of 18 U.S.C. §§ 1343, 2 (Wire Fraud and aiding and abetting) and 18 U.S.C. §
1956(a)(1) (Money Laundering).

1 intervention should be held in abeyance on this issue because the Government indicated during the
2 meet-and-confer that the questions posed by the defense which necessitated the bill of particulars
3 will be answered in various search warrant affidavits which are part of the upcoming document
4 production scheduled in approximately two to three weeks.

5 **B. Mr. Andrade's Statements**

6 The parties are in agreement that Mr. Andrade is entitled to all of his written, recorded and
7 oral statements made by him, as well as any written summaries of his oral statements contained in
8 the handwritten notes of any Government agent. Fed. R. Crim. P. 16(a)(1)(A) and (B).

9 The Government has already provided the defense with an FBI 302 reflecting a telephonic
10 interview with Mr. Andrade. The Government promised that Mr. Andrade's remaining statements
11 are in the queue for production. According to the Government, there are additional statements by
12 Mr. Andrade that will be in the next tranche of discovery the Government anticipates producing
13 in the next two to three weeks which will include a variety of media files, including both audio
14 and visual files.

15 **C. Specific Requests Under *Brady*, *Agurs*, *Giglio* and the Fifth Amendment**

16 The parties are in agreement that the Government is obligated to produce materials called
17 for by *Brady*, *Agurs*, and *Giglio*. During the January 20th meet-and-confer, the Government
18 acknowledged its continuing obligation to produce those documents to the defense. The defense
19 will take the Government at their word but will advise the Court of any future concerns that the
20 parties are unable to resolve without judicial intervention.

21 **D. Investigative Reports, Notes, Tape Recordings and Witness Statements**

22 During the January 20th meet-and-confer, the Government indicated that they have already
23 produced some of the requested documents in this category, and plan to provide additional
24 responsive documents to the defense during the next two batches of document production. The
25 defense will take the Government at their word but will advise the Court any future concerns that
26 the parties are unable to resolve without judicial intervention.

1 **E. Grand Jury Materials**

2 During the January 20th meet-and-confer, the parties could not reach an agreement
3 concerning Mr. Andrade's request for certain grand jury materials. Thus, judicial intervention is
4 required.

5 Mr. Andrade seeks the production of the legal instructions on the elements of each offense
6 and the summary of the facts described by the Government to the grand jury that purportedly
7 satisfied each particular element of the offenses just prior to requesting that the grand jury vote on
8 the indictment.

9 It is the Government's position that the weight of authority forbids the production of the
10 type of grand jury materials requested by Mr. Andrade absent a showing of particularized need.
11 Government's Opposition at 6.

12 The Supreme Court has said that disclosure of grand jury material is appropriate only in
13 those cases where the need for it outweighs the public interest in secrecy and "the burden of
14 demonstrating this balance" rests on the party seeking disclosure. *Douglas Oil Co. v. Petrol Stops*
15 *Nw.*, 441 U.S. 211, 223 (1979). In other words, the secrecy of grand jury proceedings "must not
16 be broken except where there is a compelling necessity," and the "instances when that need will
17 outweigh the countervailing policy" of secrecy "must be shown with particularity" by the
18 requester. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). ("[W]e start with a
19 long-established policy that maintains the secrecy of the grand jury proceedings in the federal
20 courts.").

21 Federal Rule of Criminal Procedure 6(e) codifies the general rule prohibiting the disclosure
22 of grand jury records. Rule 6(e)—which prohibits disclosure of any "matter occurring before the
23 grand jury" by attorneys for the government, and instructs "that persons bound by grand jury
24 secrecy must not make any disclosures about grand jury matters '[u]nless these rules provide
25 otherwise.'" Rule 6(e)(2)(B) must be read together with specifically enumerated exceptions to the
26 secrecy requirement in Rule 6(e)(3). The Supreme Court has recognized that the district courts
27 have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material and
28 that Rule 6(e)(3) is but declaratory of that authority."); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997)
("[P]ermitting departures from Rule 6(e) is fully consonant with the role of the supervising court

1 and will not unravel the foundations of secrecy upon which the grand jury is premised.”); *Carlson*
 2 *v. United States*, 837 F.3d 753, 763 (7th Cir. 2016) (“Rule 6(e) is but declaratory of the long-
 3 standing principle that disclosure of grand jury materials is committed to the discretion of the trial
 4 court.”) (internal quotation marks omitted).

5 In the instant case, Mr. Andrade has been indicted and is pending trial for wire fraud and
 6 money laundering before this Court. The charges stem from Mr. Andrade’s cryptocurrency
 7 business venture for which he has already secured several patents and a copyright of the source
 8 codes for his cryptocurrency. Mr. Andrade’s line of business is relatively new and complex. It
 9 involves blockchain technology, algorithms, and digital tokens. The federal government is still
 10 grappling with the regulatory contours of cryptocurrency and blockchain technology.² Because
 11 the stakes are so high for Mr. Andrade, who is facing up to twenty years in prison if convicted, it
 12 is critical that the Government provided the grand jury an accurate description of Mr. Andrade’s
 13 conduct when they laid out the elements of each offense for the grand jury, and how each element
 14 was satisfied by Mr. Andrade’s conduct. One of the government’s key allegations is that Mr.
 15 Andrade “misrepresented the state of the development of the technology and the viability and
 16 timeline for the final release of the functional AML Bitcoin cryptocurrency.” Dkt. 1 ¶ 9(a). Yet
 17 during our meet and confer, the government admitted that it had no “scientific and other
 18 information” in its possession and that the Government had yet to identify one or more expert
 19 witnesses. Mr. Andrade is not alleging that the Government intentionally misled the grand jury;
 20 however, based on the novelty and complexity of the technology, and with no scientific analysis
 21 or expert advice, the Government may have easily made erroneous statements during its
 22 instructions to the grand jury. If the statements were so erroneous as to confuse the grand jury,
 23 Mr. Andrade would like the opportunity to file a motion to dismiss the Indictment.

24 Accordingly, Mr. Andrade requests that the Court order the Government to produce the
 25 limited grand jury materials described above. Alternatively, the court should order the

26 ² See, e.g., H. Pierce, *How We Howey*, (SEC May 9, 2019) available at: [https://www.sec.gov/news/speech/peirce-](https://www.sec.gov/news/speech/peirce-how-we-howey-050919)
 27 [how-we-howey-050919](https://www.sec.gov/news/speech/peirce-how-we-howey-050919)

1 Government to produce the records for *in camera* inspection to determine if the Government
2 provided erroneous legal instructions concerning the application of the facts to the elements of the
3 offenses that will be the subject of Mr. Andrade's trial.

4 **F. Agent Personnel Files**

5 During the January 20th meet-and-confer, the Government indicated that they plan to
6 provide responsive documents to the defense as it relates to testifying investigative agents. The
7 defense will revisit this issue with the Government as it relates to non-testifying agents who played
8 a critical role in the trajectory of the investigation into Mr. Andrade's activities. It is not
9 uncommon for prosecutors to keep certain agents off the witness stand because they have excess
10 baggage in their personnel files. The defense will advise the Court of any future concerns that the
11 parties are unable to resolve without judicial intervention.

12 **G. Mr. Andrade's Prior Record**

13 The Government agreed to provide the defense with Mr. Andrade's criminal records. The
14 Government stated that Mr. Andrade does not have any impeachable convictions.

15 **H. Any Proposed 404(b) Evidence**

16 During the January 20th meet-and-confer, the parties agreed that the timing of Fed. R. Evid.
17 404(b) and 609 notices will be incorporated into a comprehensive schedule when the Court is
18 prepared to set a trial date.

19 **I. Evidence Seized**

20 During the January 20th meet-and-confer, the Government indicated that it was in the
21 process of reviewing seized materials pursuant to search warrants, and it is processing already-
22 seized evidence for production, including materials gathered from searches executed from 2017
23 through 2020. The defense will take the Government at their word but will advise the Court of
24 any future concerns that the parties are unable to resolve without judicial intervention.

J. Request for Preservation of Evidence

The Government and the investigative agencies will follow all normal procedures for the preservation of evidence. The defense will take the Government at their word but will advise the Court of any future concerns that the parties are unable to resolve without judicial intervention.

K. Tangible Objects

The Government is currently preparing a production of relevant audio and visual recordings that are in the possession of the prosecution team.

L. Expert Witnesses

The parties are in agreement that expert witness notices will be incorporated in a comprehensive schedule when the Court is prepared to set a trial date.

M. Scientific and Other Information

In the meet-and-confer, the Government stated that no such material had been generated yet, and stated in its Opposition that if such material is identified or generated, it will be produced to Mr. Andrade. Government's Opposition at 9.

N. Evidence of Bias or Motive to Lie

The Government indicated that it will comply with its obligations under *Giglio*. Government's Opposition at 9.

O. Impeachment Evidence

The Government indicated that it will comply with Rules 608, 609 and 613, in addition to its obligations under *Brady* and *Giglio*. Government's Opposition at 9.

P. Evidence of Criminal Investigation of Any Government Witness

The Government indicated that it will comply with its obligations under *Giglio*. Government's Opposition at 9.

Q. Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling.

The Government indicated that it will comply with its obligations under *Giglio*. Government's Opposition at 9.

R. Witness Addresses

The Government indicated that it will produce a witness list, with the information called for by the rules, at the appropriate time as ordered by the Court. Government's Opposition at 10.

S. Names of Witnesses Favorable to Mr. Andrade

The Government indicated that this case has not yet been set for trial, and the government has not yet prepared its witness list. Government's Opposition at 10.

T. Statements Relevant to the Defense

Judicial intervention should be held in abeyance on this issue at this time because during the January 20th meet-and-confer, the Government indicated a willingness to be more responsive to Mr. Andrade's discovery requests.

U. Giglio Information & Agreements Between the Government and Witnesses

The Government indicated that it will comply with its obligations under *Giglio*. Government's Opposition at 10 - 11.

V. Informants and Cooperating Witnesses

The Government indicated that this case has not yet been set for trial, and the government has not yet prepared its witness list. Government's Opposition at 11.

W. Bias by Informants or Cooperating Witnesses

The Government indicated that it will comply with its obligations under *Giglio*. Government's Opposition at 11.

X. Jencks Act Material

The parties are in agreement that the Government will produce Jencks material in advance of trial. Once a trial date is selected, the parties will further discuss a specific date for production.

III. CONCLUSION

For the foregoing reasons, Mr. Andrade respectfully requests that the Court grant Mr. Andrade's motion to compel the Government to produce the limited grand jury materials identified herein, and hold in abeyance any orders concerning the other categories of documents while the parties work through the outstanding discovery materials.

Date: January 22, 2021

Respectfully submitted,

/s/ Lionel André

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